

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

**v.
BERNARD JACKSON**

RESPONDENT,

APPELLANT.

DOCKET NUMBER WD74431

DATE: June 11, 2013

Appeal From:

Jackson County Circuit Court
The Honorable Charles E. Atwell, Judge

Appellate Judges:

Division One: Gary D. Witt, Presiding Judge, Thomas H. Newton, Judge and Mark D. Pfeiffer, Judge

Attorneys:

Richard A. Starnes, Jefferson City, MO, for respondent.

Rosemary E. Percival, Kansas City, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

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Jackson County

Before Division One: Gary D. Witt, Presiding Judge, Thomas H. Newton, Judge and Mark D. Pfeiffer, Judge

Twenty-five years after the crimes were committed, a Jackson County jury convicted Bernard Jackson of four counts of robbery in the first degree, seven counts of sodomy, and seven counts of forcible rape for which he was sentenced to eighteen consecutive life terms. The charges were in connection with the robbery of four women and the rape and sodomy of three of those women. Each woman was attacked late at night in her Waldo neighborhood home of Kansas City in either 1983 or 1984. The charges stemmed from a cold-case investigation into the unsolved crimes, in which DNA evidence was used to identify Jackson as the perpetrator.

On appeal, Jackson argues that the trial court erred in (1) overruling his motion for judgment of acquittal on various counts because the evidence was insufficient to support the jury's finding that Jackson displayed a deadly weapon or dangerous instrument during the commission of the crimes; (2) accepting the jury's verdicts and sentencing Jackson on six of the counts on offenses against victims K.M. and J.B., because the charges represent multiple punishments for the same offense in that the separate multiple allegations as to each victim were part of the "continuing course" of one crime and not separate offenses, resulting in double jeopardy; (3) overruling Jackson's *Batson* challenges to the State's use of peremptory strikes to remove three African-Americans from the venire panel; and (4) overruling Jackson's objections to testimony concerning the impact that the crimes had on the victims' lives offered during the guilt phase of the trial.

AFFIRMED

Division One Holds:

(1) The evidence was that the attacker first blind-folded each victim and then placed a cold, round, cylindrical metallic object against the necks or heads of three of the victims. He also told all four victims that he had a gun and would kill them if they did not cooperate. Because a gun need not be seen by the victim in order for it to be "exhibited" by an attacker, the State's evidence was sufficient for a reasonable juror to conclude that Jackson "displayed" a gun, thus meeting the statutory requirement that a weapon be displayed.

(2) The evidence was that the attacker partially penetrated the victims multiple times in various positions with at least some break of time with an intervening act in between each of the penetrations. Although Jackson argued that his intent was only to achieve one full penetration of each victim, and thus that his various partial penetrations constituted part of a "continuing course of conduct," Jackson's singular goal of achieving full penetration did not constitute a singular crime. Because the statutory definition of rape provides that penetration, however slight, is sufficient to commit the offense under section 566.010(1) (RSMo 1978), we find that under these facts, each penetration was a separate offense. Jackson similarly argued that his multiple acts of sodomy were also part of a "continuing course of conduct." However, under Missouri's several offense rule, although the separate acts may be part of the same transactions or same set of circumstances, they are still separate offenses by law. Here, the multiple convictions for acts of sodomy are permissible and not within the prohibition against double jeopardy. Because we find that the rape and sodomy crimes were separate offenses, we hold that Jackson was not subjected to double jeopardy.

(3) Jackson challenges three of the State's peremptory strikes that were used to strike minority jurors. *Voir dire* of the panel took three days such that the trial court had a lengthy opportunity to observe the venire persons, observe the attorneys, and evaluate the State's explanations as to its peremptory strikes. The credibility of the prosecutor as well as the court's previous experience with that prosecutor are two relevant factors in determining pretext. The court found the strikes legitimate, and that Jackson failed to meet his burden of establishing that the State's explanations were pretexts for discrimination. The trial court did not clearly err in overruling any of Jackson's three *Batson* challenges.

(4) Victim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair. The trial court allowed limited testimony from each victim and the testimony of one close friend of each victim who came to her aid on the night of the crimes. The testimony did not introduce "new and controversial matter which would result in confusion of issues, constitute unfair surprise, or cause prejudice wholly disproportionate to the value and usefulness of the offered evidence" such that it should be excluded. Moreover, Jackson failed to show how the specific evidence admitted in this case prejudiced him in such a way as to render the trial fundamentally unfair as is required. Because of the other overwhelming evidence of guilt, we do not find that the testimony created prejudice and rendered the trial fundamentally unfair. Thus, we find no abuse of discretion in the trial court's admission of such evidence.

Opinion by Gary D. Witt, Judge

June 11, 2013

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